

A Ali @ Abdul Aziz bin Hassan v Perwira Affin Bank Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-02-260 OF 1999
GOPAL SRI RAM, SURIYADI AND ABDULL HAMID EMBONG JJCA
17 APRIL 2007

C *Civil Procedure — Judgment — Grounds of judgment — Delay — Whether delay in preparation of grounds deprived audio visual advantage of trial judge*

Contract — Consideration — Guarantee — Whether promise to pay monies already lent was good consideration

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The defendant was at all material times the director and shareholder of company known as Ghulam Development & Construction Sdn Bhd ('Ghulam Development'). Ghulam Development borrowed money from the plaintiff in 1984. Later it defaulted in its obligations to repay the loan in consequence of which proceedings were brought against it to enforce the security given. The guarantee in question was dated 16 May 1991. Learned counsel for the defendant argued that this was not the true consideration for the guarantee. According to him, the true consideration was the postponement of winding up proceeding against Ghulam Development. The trial judge entered judgment for the plaintiff for the sum of RM2,132,043.19. The defendant appealed. The written grounds of judgment were not made available until 27 March 2006. It was the defendant's case that the delay in the preparation of the grounds had either deprived or seriously impaired any audio visual advantage the trial judge may have enjoyed. It was also argued that the plaintiff succeeded on an unpleaded case. It had been submitted by learned counsel for the defendant that the pleaded case referred to a guarantee executed in consideration of facilities granted. However, the case as presented to the court below by the plaintiff was that the guarantee was in truth given in order to obtain a postponement of winding up proceedings that had been commenced.

H **Held**, dismissing the appeal:

- (1) The consideration for the guarantee included a promise by the defendant to pay monies already lent by the plaintiff to Ghulam Development. That was good consideration (see para 5).
- I** (2) In the present case, issues of fact based on credibility were scarce. The defendant alleged that he did execute the guarantee at the time facilities were given to Ghulam Development. The signature on the document relied upon by the plaintiff was never questioned. The defendant merely contended that the guarantee was being used in a surreptitious manner. The learned judge having heard the evidence of PW1 and PW3 before whom the guarantee was

executed accepted their evidence. He also accepted the evidence as to the true purpose for which the guarantee was given. Accordingly, there was no room for complaint on the ground that the judgment came much later than the actual decision on the case (see para 6).

- (3) This was not a case in which the plaintiff succeeded on an unpleaded case. The facts as found by the learned judge were manifestly supported by evidence before him. There was accordingly no misdirection either in law or on the facts (see para 8).

[Bahasa Malaysia summary]

Defendan pada sepanjang masa yang material adalah pengarah dan pemegang saham syarikat yang dikenali sebagai Ghulam Development & Construction Sdn Bhd ('Ghulam Development'). Ghulam Development telah meminjam wang daripada plaintiff pada 1984. Kemudiannya, ia telah mungkir dalam tanggungjawabnya membayar balik pinjaman yang menyebabkan prosiding ini dibawa terhadapnya untuk menguatkuasakan jamina yang telah diberikan. Jaminan yang dalam persoalan adalah bertarikh 16 Mei 1991. Peguamcara defendan yang bijaksana mengatakan bahawa ini bukanlah balasan yang sebenar untuk jaminan. Menurut beliau, balasan yang sebenar adalah penangguhan prosiding penggulangan terhadap Ghulam Development. Hakim bicara yang bijaksana memasukkan penghakiman bagi pihak plaintiff bagi jumlah RM2,132,043.19. Defendan merayu. Penghakiman bertulis tidak disediakan sehingga 27 Mac 2006. Ini adalah kes defendan bahawa kelewatan dalam penyediaan alasan telah sama ada mengurangkan atau kerosakan yang serius mana-mana kelebihan pandang dengar yang dinikmati oleh hakim bicara. Dinyatakan juga bahawa plaintiff telah Berjaya di atas kes yang tidak diplidkan. Adalah dihujahkan oleh peguamcara bagi pihak defendan bahawa kes yang diplidkan merujuk kepada jaminan yang telah dilaksanakan sebagai balasan kemudahan yang diberikan. Tetapi, kes yang diutarakan kepada mahkamah bawahan oleh plaintiff adalah jaminan adalah benar diberikan dalam mendapatkan penagguhan prosiding penggulangan yang telah dimulakan.

Diputuskan, menolak rayuan:

- (1) Dalam mempertimbangkan jaminan termasuklah satu perjanjian oleh defendan untuk membayar wang yang telah dipinjamkan oleh plaintiff kepada Ghulam Development. Itu adalah balasan yang baik (lihat perenggan 5).
- (2) Dalam kes ini, isu-isu fakta berdasarkan kredibiliti adalah sukar didapati. Defendan telah mengatakan bahawa beliau telah melaksanakan jaminan pada masa kemudahan diberikan kepada Ghulam Development. Tandatangan pada dokumen yang diharapkan oleh plaintiff tidak pernah dipersoalkan. Defendan hanya menyatakan bahawa jaminan telah digunakan secara curi-curi. Hakim yang bijaksana telah mendengar keterangan PW1 dan PW3 di hadapan mereka yang telah melaksanakan jaminan telah menerima keterangan mereka. Beliau juga menerima keterangan sebagaimana tujuan sebenar jaminan yang telah diberikan. Sewajarnya, tidak terdapatnya ruang

- A untuk mengadu atas alasan bahawa penghakiman hanya wujud selepas keputusan sebenar kes (lihat perenggan 6).
- (3) Ini bukanlah kes yang mana plaintif berjaya dalam kes yang tidak dihidkan. Fakta-fakta yang didapati oleh hakim yang bijaksana adalah jelas disokong dengan keterangan di hadapannya. Adalah sewajarnya tiada penyalaharahan sama ada dalam undang-undang atau fakta (lihat perenggan 8).]
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Notes

For a case on grounds of judgment, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) para 147.

- C For cases on guarantee, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2676–2682.

Cases referred to

Ryan v Jarvis [2005] UKPC 27 (refd)

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Appeal from: Civil Suit No 22–37 of 1995 (High Court, Kuantan)

Bastian Vendargon (Vendargon & Partners) for the appellant.

- E *Hon Kai Ping (Khalidah Khalil with him) (Raja Azhar & Husain Safri) for the respondent.*

Gopal Sri Ram JCA (delivering judgment of the court):

- F [1] This appeal is directed against the order of the High Court Kuantan entering judgment for the plaintiff (respondent before us) on a guarantee executed by the defendant (appellant before us) in the sum of RM2,132,043.19. A number of grounds have been advanced before us in support of the appeal of which only one calls for discussion.
- G [2] The principal ground on which the judgment under appeal has been attacked is that the plaintiff succeeded on an unpleaded case. It has been submitted by learned counsel for the defendant that the pleaded case refers to a guarantee executed in consideration of facilities granted. However, the case as presented to the court below by the plaintiff was that the guarantee was in truth given in order to obtain a postponement of winding up proceedings that had been commenced. To understand this submission, it is necessary to hearken to some salient facts.
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- I [3] The defendant was at all material times the director and shareholder of company known as Ghulam Development & Construction Sdn Bhd ('Ghulam Development'). Ghulam Development borrowed money from the plaintiff. This was sometime in 1984. Later it defaulted in its obligations to repay the loan in consequence of which proceedings were brought against it to enforce the security given. The guarantee in question is dated 16 May 1991. The opening clause of the guarantee says this:

In consideration of I/We having made a request and at my/our desire of you, Perwira Habib Bank Malaysia Berhad (hereinafter called 'the Bank' which expression shall where the context so admits include the Bank successors and assigns) having opened, opening or continuing an account with and having made, making or shall make advance loans or otherwise having given or giving or shall give credit or affording banking facilities and accommodation or not terminating or withdrawing any such advances credit or banking facilities or accommodation already made or given to Ghulam Development & Construction (M) Sdn Bhd of K-124, Jalan Kampung Tengah, Kemaman, Terengganu (hereinafter called 'the customer') for as long as you may at your sole discretion deem fit I/We Ali @ Abdul Aziz b Hassan IC No: 3107413 the undersigned hereby jointly and severally agree with and unconditionally guarantee you as follows that is to say...

[4] Learned counsel for the defendant argues that this is not the true consideration for the guarantee. According to him, the true consideration was the postponement of winding up proceeding against Ghulam Development. With respect we are unable to agree.

[5] The confusion in the defendant's mind is as a result of the failure on his part to appreciate the difference between the consideration for a guarantee and its purpose. The former is expressed in the clause quoted above. The latter emerged in the course of evidence in the trial. As may be seen, the consideration for the guarantee included a promise by the defendant to pay monies already lent by the plaintiff to Ghulam Development. That in our judgment is good consideration. In the circumstances there is no merit in the point canvassed before us.

[6] The other point which we think must mention is this. The trial in this matter concluded on 8 March 1999 when the judge made his order in the plaintiff's favour. He entered judgment for the sum of RM2,132,043.19. The written grounds of judgment were not made available until 27 March 2006. It is the defendant's case that the delay in the preparation of the grounds has either deprived or seriously impaired any audio visual advantage the trial judge may have enjoyed. We must dissent from this submission. In the present case, issues of fact based on credibility were scarce. The defendant alleged that he did execute the guarantee at the time facilities were given to Ghulam Development. The signature on the document relied upon by the plaintiff was never questioned. The defendant merely contended that the guarantee was being used in a surreptitious manner. The learned judge having heard the evidence of PW1 and PW3 before whom the guarantee was executed accepted their evidence. He also accepted the evidence as to the true purpose for which the guarantee was given. Accordingly, there was no room for complaint on the ground that the judgment came much later than the actual decision on the case.

[7] The role of this court in a case such as the present is well settled. We will defer to the findings of fact based on credibility made by a trial court. As stated by Lord Hoffman in *Ryan v Jarvis* [2005] UKPC 27 when delivering the advice of the Board in an appeal from Antigua & Barbuda:

It is of course most unusual for an appellate tribunal to reverse a trial judge's findings on credibility on the ground that the evidence which he rejected has the ring of truth. The true or false note is generally more audible to the judge who hears and sees the witnesses than to the appellate court reading the record.

A [8] To sum up, this is not a case in which the plaintiff succeeded on an unpleaded case. The facts as found by the learned judge are manifestly supported by evidence before him. There is accordingly no misdirection either in law or on the facts.

B [9] For the reasons already given, this appeal fails. The appellant must pay the costs of this appeal. The deposit shall be paid out to the respondent in account of taxed costs. All other orders of the High Court are affirmed.

Appeal dismissed with costs.

C Reported by Loo Lai Mee

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